United States Court of Appeals

FOR THE NINTH CIRCUIT

C. J. MONTAG & SONS, INC., et al,
Appellees-Appellants,

vs.

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al,
Appellants-Appellees. — No. 18875

HOLMAN ERECTION COMPANY, INC.,
Appellee,

vs.

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al,
Appellants. — No. 18876

CURTIS CONSTRUCTION CO., a corporation,
Appellee,

vs.

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al,
Appellants. — No. 18877

PETITION FOR REHEARING EN BANC

R. MAX ETTER,
Suite 706 Spokane & Eastern Bldg.
Spokane, Washington 99201
Attorney for Appellants

KERSHAW'S, INC.

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TO:

JUDGES HAMLEY, MADDEN and JERTBERG:

The appellants above, also appellees in No. 18875, respectfully petition the Court for a rehearing en banc of the appeal in the above-entitled causes, and in support of this petition represent to the Court as follows:

1. The Court erred in finding that a "controversy" within the meaning of the Act was present, because of conflicting claims to work by the Carpenters and Iron Workers, which prohibited resolution of the conflict by Montag. The opinion of the Court reciting in part,

> ". . . in January, 1957, there began a continuing controversy between Montag and Local 1849 as to whether, and to what extent, the 'rigging' of certain forms which were to be used in the pouring of concrete on the dam should be done by Carpenters or by workmen of another craft" (p. 3 of Opinion).

constituted a finding of a primary dispute between the Carpenters and Montag, not a union conflict.

2. The Court erred in finding a jurisdictional dispute after the agreement of Carpenters and ~~Boilermakers~~ Iron work was made in August 1957, when it concludes that

> "The representatives of the two unions sought to put into effect a tentative agreement reached by their Presidents" (p. 6 of Opinion).

The record does not support the Court's description of the Carpenter-Iron Worker Agreement of August 1957 as "tentative." The refusal of the employer to accept an agreed solution does not support the conclusion, therefore, that it was a tentative agreement between the two unions.

3. The Court erred in finding that a jurisdictional dispute existed between the Carpenters and Iron Workers after August 1957. The acceptance by the Iron Workers, following the agreement of August 1957 with the Carpenters, of the work assigned, does not support the requirements of a jurisdictional dispute when Iron Workers had neither taken or threatened any proscribed action to support a claim, but had agreed to forego claim to the work proposed as the Carpenters.

4. The Court erred in failing to find that Montag could have ended the dispute by assigning the agreed-upon work to the Carpenters, when it knew following the agreement, that there would be no action taken in violation of the law by the Iron Workers.

5. The Court erred in failing to apply the reasoning in *Penello v. Sheet Metal Workers Union* to determine the basic nature of a jurisdictional dispute, when the dispute was primary from its inception, and in any event terminated not later than August 1957. (A) The Court erred in holding that, with respect to *Penello* "this case does not resemble it at all . . ." where substantial similarities of economic motivation on the part of the employer in assigning the work existed, and where there was either an absence, or a termination, of any active dispute over claimed work. (B) The Court erred in failing to find that an active dispute between contending unions is equally essential to an action under Section 303 of the Act, or one under Section 8(b)(4)(d). Though remedies may be independent, with inconsistent findings in actions pursued separately, such

inconsistent findings result only from independent consideration by separate fact-finding bodies, to-wit, the Board, the Court, or a jury. Inconsistency does not reside in, or result from, the legal principles applicable.

6. The Court erred in failing to find that the Carpenters and ~~Boilermakers~~ Iron workers had an agreement eliminating any dispute between them. Disagreement of Montag and the Court with the solution does not create a new actionable dispute. The agreement terminated the dispute, if any, within the contemplation of the Act, and Montag cannot therefore, invoke either Section 8(b)(4)(d) or Section 303 of the Act. Both Sections being in derogation of the right to strike, should be applied only to true active jurisdictional conflict, leaving any other charges of Montag to redress under appropriate provisions of the Act.

7. The Court erred in considering any issue of "featherbedding" and embodying such consideration in its finding that the Carpenters were not entitled to redress on the cross-complaint. (A) No part of the action between the litigants was based on any allegation or claim of "featherbedding." (B) If there was an issue of "featherbedding" it was properly a part of the function of the N.L.R.B. under Section 8(b)(6) of the Act and within its primary consideration, which preempts the Court's jurisdiction. (C) The Court erred in construing law and policy relating to "featherbedding." Section 8(b)(6) is directed against "services not performed or not to be performed" . . ., and the finding of the Court in supporting Montag, that the solution provided by agreement of the Unions and the

National Joint Board upon submission by both unions and employer is impractical or inconvenient, does not support the finding or conclusion of "featherbedding."

8. The Court erred in ignoring the policy of encouraging private settlement of disputes, while stressing the evils of such dispute and the policy of law to eliminate them.

9. The Court erred by attempting to determine the merits of the settlement reached, and the Joint Board order based upon it. The Court viewed it solely from the standpoint, of that which it would have ruled proper, had the settlement been expressed in the determination made by the National Labor Relations Board. The Court, therefore, erred in failing to apply its consideration to the policies and the rules that govern arbitration.

10. The Court erred in finding that Montag did not breach its agreement with the Carpenters in failing to follow the National Joint Board's order, and it was error for the Court to go behind the determination and reject it because it was a determination which the Court would not have made.

11. The Court erred by its finding and determination that the assignment by Montag was final and not subject to contention by the Carpenters. (A) The evidence of the primary dispute in January 1957 between the Carpenters and Montag (see No. 1, supra), or the settlement of August 1957 between the Carpenters and Iron Workers followed by the rejection of Montag, does not create the basis of a jurisdictional dispute. This is rejection only of an employer determination

and assignment. The Court's holding is contrary to the opinion of the Supreme Court of the United States in *N.L.R.B. v. Radio Television Engineers Union,* 364 U.S. 357.

12. The Court erred in failing to find that Montag, in its original assignment to the Iron Workers, violated the procedural rules of the National Joint Board, and that therefore any dispute, stoppage or damages resulting therefrom were the proximate result of its breach of contract.

13. The Court erred in substituting its findings of fact, from which it concluded in law, that the Carpenters award by the National Joint Board would constitute "featherbedding." There was sufficient credible evidence in the record to support the finding of the National Joint Board in its decision and award of work, and to support the District Court's conclusion in law and award on the Carpenter cross-complaint.

Respectfully submitted,
R. MAX ETTER
Attorney for Appellants

STATE OF WASHINGTON }
COUNTY OF SPOKANE } ss.

R. MAX ETTER, being first duly sworn, on oath certifies and says:

That he is the attorney for appellants in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this Court; that in his judgment the within and foregoing Petition for Rehearing is well founded and is not interposed for delay.

R. MAX ETTER

Subscribed and sworn to before me this 10th day of August, 1964.

ROBERT WEINSTEIN,
(SEAL) Notary Public for the State of Washington
Residing at Spokane